United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL 76-7262

To be argued by
MACDONALD FLINN

United States Court of Appeals

For the Second Circuit

B

HAROLD S. LEE, ERIC LEE and LESTER LEE,
Plaintiffs-Appellees,

vs.

JOSEPH E. SEAGRAM & SONS, INC.,
Defendant-Appellant.

P/S

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT, JOSEPH E. SEAGRAM & SONS, INC.

WHITE & CASE
Attorneys for Defendant-Appellant
Joseph E. Seagram & Sons, Inc.
14 Wall Street
New York, New York 10005
(212) 732-1040

Of Counsel:
MACDONALD FLINN
E. MILES PRENTICE, III
ROBERT W. MANNIX

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

United States Court of Appeals

For the Second Circuit

Docket No. 76-7262

HAROLD S. LEE, ERIC LEE and LESTER LEE,
Plaintiffs-Appellees,

vs.

JOSEPH E. SEAGRAM & SONS, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT, JOSEPH E. SEAGRAM & SONS, INC.

Introduction

Throughout their brief, plaintiffs-appellees argue that Seagram has failed to meet the standards for judgment notwithstanding the verdict. Of the two alternative criteria for judgment n.o.v., Seagram predicated its motion below upon plaintiffs' failure to offer competent proof of material elements necessary to their breach of contract claim—elements essential to making a *prima facie* case which would justify submission of that claim to the jury.[1] Plaintiffs urge repeatedly that Seagram is now attempting "to chal-

1. The standards for a directed verdict or judgment n.o.v. are the same, and they include not only the situation where there are no controverted issues of material fact upon which reasonable men could differ but also those cases where there is a complete absence of competent proof on any issue material to the cause of action so that there is a failure to establish a *prima facie* case. See 5A *Moore's Federal Practice*, ¶¶50.02[1], 50.07[2].

lenge the facts of record underlying the verdict for the first time on this appeal . . .'' (Br., p. 14), that it is attempting ''to retry the facts of the case without giving the slightest weight to the findings of both the jury and trial court . . .'' (Br., p. 17), and that ''the appeal raises only . . . garden-variety issues of fact'' going to ''the weight of the evidence.'' (Br., p. 3)

Patently Seagram could not claim below and does not claim now that there was no disputed issue of fact upon which reasonable men could differ. As to the keystone of plaintiffs' case, the alleged oral agreement to relocate Lester and Eric Lee, there was a total conflict between the testimony of Harold Lee, the only witness who could testify as to that agreement, and Yogman, who denied it. Having simply noted that conflict in its statement of the case to apprise the Court of the substance of the dispute between the parties, however, Seagram proceeds here, as it did below, on the basis that proof of that oral agreement, accepting all of plaintiffs' evidence without reliance upon the conflicting testimony, was barred as a matter of law by New York's parol evidence rule.

Similarly, in arguing that the alleged oral agreement was so vague as a matter of law as to be unenforceable, Seagram accepts for purposes of this appeal every word of Harold Lee's testimony concerning its terms and any other competent evidence from which additional terms arguably could be inferred. Finally, in arguing that as a matter of law plaintiffs' damage proof was incompetent and speculative, Seagram relies only upon the testimony of plaintiffs' accountant to establish its contentions.[2]

Because Seagram believes that the points made in its principal brief answer the plaintiffs' contentions, Seagram will attempt to avoid reiteration and will instead limit discussion in this reply brief to only several of plaintiffs'

2 Seagram does not, however, accept (and need not accept in order to succeed in its appeal) the numerous incorrect characterizations of the evidence, far transcending the reasonable inferences fairly to be drawn in favor of plaintiffs, which appear throughout their brief.

arguments which highlight the conclusion that a directed verdict or judgment n.o.v. should have been granted by Judge Tenney.

1. Reply to Plaintiffs' Contentions as to the Parol Evidence Rule

Plaintiffs' efforts to sustain their judgment on the ground that there was sufficient evidence to support the jury's verdict are perhaps most apparent, and at the same time most misplaced, in their treatment of the parol evidence rule. Plaintiffs' parol evidence argument is that the "jury finding must stand on appeal because substantial evidence supports it." (Br., p. 29) As the court below recognized, whether the parol evidence rule applies is an issue solely within the province of the court, not the jury. (106a-107a) Contrary to plaintiffs' arguments, it was not for the jury to decide whether the oral agreement was collateral, whether the written contract appeared to be fully integrated or any other issue necessary to resolve the parol evidence question.

Even if Judge Tenney had erroneously allowed the jury to decide that issue of law,[3] the jury's determination could

3. Plaintiffs cite Judge Tenney's ruling in denying Seagram's summary judgment motion that "determination as to whether the parol evidence rule even applies in this case must await the taking of evidence as to whether the written Sales Agreement was intended to be a complete and accurate integration of all the mutual promises of the parties." Plaintiffs then urge (Br., pp. 18-19) that Judge Tenney, "having clearly spelled out that test," so charged the jury and that Seagram's failure to object to that charge somehow bars Seagram's parol evidence challenge on this appeal. As the portion of the charge cited by plaintiffs shows, however, the instruction given to the jury was not a submission to them of the determination of the parol evidence issue but rather the fact issue legitimately within their province as to whether "the alleged oral agreement was made even though it was never set forth in writing." The jury was simply instructed that it could consider the absence of any writing to support the alleged oral agreement "in determining whether the alleged agreement was made." (453a) There can be no basis for suggesting that Seagram is barred from pursuing its parol evidence argument. Seagram's parol evidence objections were of record even before the trial in consequence of the summary judgment motion.

in no way bind this Court. Seagram's contention, supported by the cases and analysis set forth in its principal brief, is that while the trial court itself decided the parol evidence issue (as it was the court's sole responsibility to do) it reached an erroneous conclusion, which requires reversal by this Court. The jury simply should not have been given the fact question as to whether there was an oral agreement to relocate Lester and Eric Lee, because—accepting plaintiffs' own evidence as to the alleged agreement—proof of that agreement was barred as a matter of law by New York's parol evidence rule.

Another misconception throughout plaintiffs' discussion of the parol evidence issue (Br., pp. 5-9, 18-20) is that Seagram had to prove the actual intent of the parties to integrate all of their mutual promises in the written contract for the sale of Capitol City. Thus plaintiffs take Seagram to task for not calling Messrs. Fieldsteel, Barth and O'Brien (the Seagram representatives with whom plaintiffs negotiated the terms of the written sale contract) regarding the intentions of the parties. Factually this contention is baseless on its face. Fieldsteel, Barth and O'Brien could have shed no light on the purported issue of the parties' intention, because the plaintiffs admitted, as discussed in Seagram's main brief (pp. 3-4, 18), that they never mentioned relocation as a condition to the agreement by the Lee families to sell Capitol City to anybody other than Yogman. In addition, in any case where, as here, a defendant denies the alleged oral contract, patently no witness for that defendant can testify as to the spurious issue of the parties' intent with respect to integration other than to deny that any oral agreement was ever made.

More importantly, the legal issue is *not* whether the parties in fact intended the written contract to integrate all of their mutual promises, because any such standard would, as a practical matter, eviscerate the parol evidence rule and the strong policy behind it. The New York

authorities, if not those everywhere,[4] hold that, in applying the rule, the task for the court is to examine the written contract to determine whether, in all the circumstances, it *appears* to be a complete and integrated agreement. In that event it is presumed to contain all of the commitments and obligations which the parties would ordinarily be expected to embody in the writing, and proof of additional oral terms and conditions which would vary, enlarge, add to or contradict the written terms is barred.

That is the teaching of *Mitchill* v. *Lath,* 247 N.Y. 377, 380-81, 160 N.E. 646, 647 (1928), which even plaintiffs appear to accept as the leading New York case on parol evidence. *Mitchill* holds that to allow proof of an oral agreement "it must be one that parties would not ordinarily be expected to embody in the writing, or, put in another way, an inspection of the written contract, read in the light of surrounding circumstances, must not indicate that the writing appears 'to contain the engagements of the parties, and to define the object and measure the extent of such engagement.' . . ." The language thus quoted in *Mitchill* traces back to *Eighmie* v. *Taylor,* 98 N.Y. 288, 294-295 (1885), where the New York Court of Appeals unequivocally stated:

> "If we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself. The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. If upon inspection and study of the writing, read, it may be, in the light of surrounding circumstances in order to insure its proper understanding and

4. See 4 *Williston on Contracts,* §633 (3d Ed. 1960) ("It is generally held that the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms," as opposed to proof of a clearly separate oral agreement).

> interpretation, it appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract.''[5]

Internal consistency is clearly not plaintiffs' hobgoblin. They urge (Br., p. 28) that Seagram's position on the parol evidence rule "is not helped by the contention that the oral promise was a 'condition' of the written agreement," because allegedly there is no evidence of record "in support of any of these contentions . . . ." Elsewhere in their brief (Br., p. 10), however, plaintiffs state, with record citations, "The three Lees testified . . . that Seagram's agreement to relocate the three Lees was a condition to the sale of Capitol City (130a-132a, 133a-135a, 137a-138a, 178a, 196a, 236a-237a)."

Having admitted this fact established by their own evidence, however, plaintiffs wholly avoid the unyielding line of New York decisions which hold that, where the written contract is conditioned upon the alleged oral agreement as the inducing cause, and where, as the plaintiffs testified in this case, they would not have entered into the written contract but for the alleged oral agreement, the parol evidence rule bars proof of that asserted oral agreement. (See Seagram's principal brief, pp. 9-12.) Plaintiffs dismiss that unbroken series of decisions by ignoring all but *Mitchill* (Br., p. 22), which they characterize as containing only "dictum concerning 'the inducing cause' for real estate leases." Even a hurried reading of those cases and the

5. See also *Thomas* v. *Scutt*, 127 N.Y. 133, 138, 27 N.E. 961, 963 (1891) ("Two things, however, are essential to bring a case within [the class which recognizes the writing as incomplete and admits parol, not to vary or contradict, but to complete the entire agreement of which the writing was only a part]: 1. The writing must not appear upon inspection to be a complete contract . . . for in such a case it is conclusively presumed to embrace the entire contract. 2. The parol evidence must be consistent with and not contradictory of the written instrument"); *Edison Electric Illuminating Co.* v. *Thacher*, 229 N.Y. 172, 128 N.E. 124 (1920); *Seitz* v. *Brewers' Refrigerating Co.*, 141 U.S. 510, 517 (1891).

general treatises characterizing them which are cited in Seagram's brief will demonstrate that they cannot be so limited. Instead, they compel the conclusion that plaintiffs' own proof establishes that their alleged oral agreement is barred by New York's parol evidence rule, which strikes down any oral agreement admitted to be the inducing cause for the written contract because any term or condition of such importance would ordinarily be expected to be embodied in the writing.

With respect to the parol evidence question, plaintiffs place their principal reliance upon this Court's decision in *Gem Corrugated Box Corp.* v. *National Kraft Container Corp.*, 427 F.2d 499 (2d Cir. 1970). Even apart from the fact (discussed in Seagram's main brief, pp. 20-21) that the oral agreement in *Gem* was not made until after the execution of the written box purchase contract, the other grounds asserted by this Court for its decision there are wholly consistent with *Mitchill* and the numerous other New York cases which hold that where a prior or contemporaneous oral agreement is the inducing cause for the execution of the written contract the parol evidence rule prevails.

On the facts of *Gem,* it could not reasonably be argued that the written box requirements contract was of equal importance to the subsequent oral stock purchase agreement, let alone that it was the "principal transaction." To the contrary, the plaintiff in *Gem* did not so much as decide to accept the proposed stock offer until months after it had entered into the written requirements contract (even if the proposed stock sale or potential opportunity to make such an agreement at a later time was the inducement to the plaintiff to enter into the requirements contract).[6]

6. Unlike the facts of the case at bar and those in the cases upon which Seagram relies, there could be no finding in *Gem* that the plaintiff concededly would not have signed the written contract absent a contemporaneous or prior oral agreement which, in and of itself, furnished "indisputable acknowledgment that the transaction was single and the oral agreement not only was part of the consideration but was the inducing cause for the execution of the written contract." *Fogelson* v. *Rackfay Construction Co.,* 300 N.Y. 334, 340, 90 N.E.2d 881, 883-884 (1950).

Understandably, the plaintiffs attempt to clothe their alleged antecedent oral agreement to relocate them in the language of *Gem*, quoting its references to the oral offer ultimately accepted there as the "principal transaction." Still understandably, they embellish *Gem* by characterizing their alleged oral agreement as the "dog," not its "tail."[7] (Br., pp. 25-26) At the same time, while urging that in both *Gem* and the instant case the oral agreements were the "principal transactions," even in their advocacy plaintiffs belie that contention in conceding (Br., p. 25) that the subject matter of their alleged oral agreement was "at least as important as the subject of the written agreement." *Gem*, therefore, can only destroy the plaintiffs' case, because the asserted oral agreement here, as they admit, was no more important that the written contract for the sale of Capitol City, let alone the "principal transaction." Patently there could not be other than a parity of importance when the essence of their alleged oral agreement is the substitution of one liquor distributorship for another.

Plaintiffs here allege a contemporaneous oral agreement to relocate them in another distributorship. In affidavits, constituting judicial admissions, which were submitted to Judge Tenney on Seagram's summary judgment motion, plaintiffs' counsel characterized the oral promise as "part of the agreement for the sale of Capitol City" and a "material term" of that agreement. Plaintiffs themselves unequivocally testified that they would not have entered into the written contract to sell Capitol City but for Seagram's alleged prior acquiescence in the oral agreement to relocate them in another distributorship. In those circum-

7. Plaintiffs argue that *Mitchill, Fogelson* and the other cases upon which Seagram relies were cases where the oral agreement was clearly the "tail of the dog," involving less important subject matter. If the oral agreements in those cases were somehow less important, even though the inducing cause for the written contracts, the conclusion reached in those decisions that such provisions would be expected to be embodied in the writing makes all the stronger the expectation that here the plaintiffs' more important oral agreement would be contained in the written contract for the sale of Capitol City.

stances, the alleged oral agreement could not have been more important than the written contract for the sale of Capitol City, let alone the "principal transaction," because on plaintiffs' own characterization the two promises were completely interdependent. Without Seagram's alleged promise to substitute another distributorship, plaintiffs emphatically assert that there would have been no agreement to sell Capitol City, and there is neither claim nor evidence that without the agreement by the Lees to sell Capitol City Seagram would have promised to relocate the plaintiffs.

On these facts, unlike the circumstances of *Gem,* Seagram submits that to urge that the alleged oral agreement here was the "principal transaction" defies all logic and reason. Plaintiffs' alleged oral agreement was not only so clearly connected with the principal and only transaction as to be part and parcel of it, but on plaintiffs' word it must be concluded that there was a single, indivisible transaction, neither side of which could subsist without the other.

The facts of *Gem* also compelled this Court to conclude, in keeping with *Mitchill* and its progeny, that the parties there ordinarily would not be expected to have embodied the stock purchase agreement in a writing concerned only with the terms of the mundane purchase of boxes. By contrast, here plaintiffs cannot reasonably argue that the oral promise to obtain a distributorship for them was a meaningfully different or more important subject than the agreement for the purchase and sale of Capitol City. Unlike *Gem,* the similarity if not identity of subject matter is such that the parties *would* ordinarily be expected to embody the alleged oral stipulation in the written contract.[8]

8. Plaintiffs argue (Br., p. 20) that here the parties could not be expected to embody the oral agreement in the written contract, because the two contracts were between "formally different parties" in that the sale contract was executed by all five Lees whereas the oral agreement was allegedly only with the three plaintiffs. The sole evidence of record, however, is to the contrary, because Harold Lee testified that he offered to sell all of Capitol City on behalf of all the

(footnote continued on next page)

Gem poses still other pitfalls for the plaintiffs. In addition to the other reasons for holding that the parol evidence rule had no application, this Court pointed to the fact that the oral agreement there did "not serve to vary or modify the engagement of the parties with respect to the terms" of the written box purchase contract. (427 F.2d at 503) Even if there had been an agreement on the purchase of stock before or contemporaneous with the written box purchase contract, that oral agreement would not have varied the consideration expressed in the written contract by imposing any additional obligation upon the plaintiff there. It would have paid the same price for its box materials and would not have incurred any other obligation. Thus, the plaintiff in *Gem* was free to buy only "as many shares as it wished." (427 F.2d at 502-503) It was not obligated to buy any. By contrast, in addition to the obligation to pay $2,500,000 for Capitol City, spelled out as an express term in the written contract, Seagram would be additionally obligated by plaintiffs' alleged oral agreement to provide them with another distributorship or to perform whatever other commitment the oral agreement imposed upon it. The parol evidence rule does not permit the express consideration of the written agreement to be thus varied, enlarged or contradicted.

Plaintiffs also urge (Br., p. 27) that the alleged oral promise to relocate them is governed not by *Mitchill* but instead by *Hicks* v. *Bush*, 10 N.Y.2d 488, 180 N.E.2d 425 (1962). As discussed in Seagram's principal brief (pp. 16-17), parol was held admissible there not to vary or add

---

Lees, so that all five Lees were necessarily parties to the alleged oral agreement even if only Lester and Eric were the beneficiaries of the additional obligation asserted against Seagram to relocate them. (See pp. 7-8, 15-16 and 17-18 of Seagram's main brief.) *Mitchill* demonstrates that the courts will look to substance rather than form, and will not reject the parol evidence rule because of "formally different parties." In that landmark case, while the plaintiff was the party to the oral agreement, it was her husband who signed the written contract even though she was the beneficiary of its purchase provisions.

to the terms of a written agreement but to establish that it never became legally binding because a specified and agreed to condition precedent failed to occur. If plaintiffs truly contend that the oral promise to relocate them was a condition precedent to the legal effectiveness of the written contract for the sale of Capitol City, then it follows that their relief lies in tendering to Seagram its $2,500,000 for the return of Capitol City.

2. Reply to Plaintiffs' Contentions as to Vagueness and Unenforceability

In the case at bar, while plaintiffs now urge after the trial that Seagram's obligation was merely to notify them of distributorships for sale, the evidence as to the alleged oral agreement discloses only a single obligation purportedly imposed upon Seagram, *i.e.*, to relocate Lester and Eric Lee in (or, as the jury was instructed, to provide them with) another distributorship. It is the complete uncertainty and ambiguity of that sole obligation which renders the plaintiffs' oral agreement fatally vague and unenforceable as a matter of law.

The plaintiffs rely upon cases which, by contrast, involved circumstances that gave certainty to the parties' understandings and demonstrated that there had been a genuine meeting of their minds, despite partially incomplete language or an open term in their agreements.[9] Two of those cases involved written offers of compromise and settlement of existing disputes,[10] whereas in the instant case

9. With respect to the portion of Judge Weinfeld's opinion in *Allen & Company* v. *Occidental Petroleum Corporation*, 382 F. Supp. 1952 (S.D.N.Y. 1974), *aff'd*, 519 F.2d 788 (2d Cir. 1975), cited at p. 30 of its principal brief, Seagram concedes that this Court's affirmance was on other grounds and that it rejected the language quoted by Seagram. Seagram apologizes both to the Court and plaintiffs' counsel for its failure to note that fact prior to service of plaintiffs' brief.

10. *St. Joseph's Immigrant Homes, Inc.* v. *Seaman*, 53 Misc.2d 1095, 281 N.Y.S.2d 143 (Civ. Ct. N.Y. Co. 1967), and *Castelli* v. *Tolibia*, 83 N.Y.S.2d 554 (Sup. Ct. N.Y. Co. 1948), *aff'd*, 276 App. Div. 1066, 96 N.Y.S.2d 488 (1st Dept. 1950).

the claimed agreement was oral and embodied a wholly new relationship between the parties with undertakings unrelated to their prior dealings. Three of plaintiffs' cases involved delivery route agreements between suppliers and deliverers who had a prior course of dealing with each other involving those very same arrangements.[11]

In the case at bar, the alleged oral agreement is a wholly new transaction for these parties and their prior relationship with each other or with the alcoholic beverage industry in no way explicates what Seagram was to do to fulfill the obligation, as to which Harold Lee testified, to relocate Lester and Eric Lee. By contrast, in the cases cited by plaintiffs, there was little difficulty in finding sufficient certainty to hold agreements enforceable, and most of those cases dealt with a single potentially ambiguous provision among other terms clearly stated, rather than an agreement infected by uncertainty in its entirety.[12] The rule urged by plaintiffs upon the basis of those cases that a contract must

11. *Barnard Bakeshops, Inc.* v. *Dirig,* 19 N.Y.S.2d 224 (Sup. Ct. Broome Co. 1940); *Borden* v. *Chesterfield Farms, Inc.,* 27 App. Div. 2d 165, 277 N.Y.S.2d 494 (1st Dept. 1967); and *Feldman* v. *Rockaway News Supply Co.,* 6 Misc.2d 406, 157 N.Y.S.2d 671 (Sup. Ct. N.Y. Co. 1956). *Feldman,* which determined that an arbitration award explicitly directing the parties to deal as they had in the past was enforceable, is particularly inapposite on the facts of the instant case where there was no prior course of dealing in any way related to relocating plaintiffs in or providing them with a new distributorship.

12. In *Consolidated Blasting Corp.* v. *Colabella Bros. Inc.,* 10 Misc.2d 913, 168 N.Y.S.2d 275 (Sup. Ct. N.Y. Co. 1957), the court found that a compensation term of "about $3000" was not too vague where the work had been done and roughly that amount paid. *Silverman* v. *Alpart,* 282 App. Div. 631, 125 N.Y.S.2d 602 (3d Dept. 1953), involved conflicting interpretations of a single term in a written contract for the sale of land. *M. O'Neil Supply Co.* v. *Petroleum Heat & Power Co.,* 280 N.Y. 50, 19 N.E.2d 676 (1939), involved a written three-party contract fully performed by the plaintiff-supplier who was seeking payment for the materials furnished under the contract. *Vineyard* v. *Martin,* 29 N.Y.S.2d 935 (Sup. Ct. N.Y. Co. 1941), involved a contract between joint venturers for one to supply additional funds up to a set limit to complete construction under the joint venture where the plaintiff had already transferred stock to the defendant to serve as collateral.

be construed to render it enforceable is qualified by the words, "if possible."

The plaintiffs' characterization of the evidence purportedly defining or giving meaning to Seagram's alleged obligation is misleading. For example, they cite (Br., p. 32) testimony by Yogman as to his conversation with Harold Lee, which they state proves the making of that agreement. They fail to explain, however, that the conversation as to which Yogman testified took place after the sale of Capitol City had been closed. (341a-342a)

Similarly mischaracterized is the evidence plaintiffs cite (Br., pp. 32-33) as proving Yogman's recognition of what Seagram was obligated to do and his alleged assurances that he would work under a deadline to fulfill such an obligation. (265a, 267a, 341a-343a, 345a-346a, 348a, 388a-389a, 409a, 416a-420a, 433a) That testimony indicates only that after the sale of Capitol City Yogman expressed a friendly willingness to help if he heard of any house for sale, but it underlines how little help he was able to give because of the unavailability of houses for sale. Plaintiffs have omitted the balance of Yogman's quoted testimony (Br., p. 32) which puts in totally different perspective their claim that he recognized Seagram's alleged obligation.[13] While Yogman denied any agreement as a condition to the sale of Capitol City, he never denied that after that sale, when Harold Lee approached him, he expressed his willingness to help find a new house and to notify the Lees if he heard of any that were available. In no way does his testimony, or any other, evidence any sense of contractual obligation or define what any obligation to "relocate" Lester and Eric

13. "But then I [Yogman] told him [Harold Lee], 'Look hard. You know the distributors a lot better than I do. You have been in the business longer than I have and you have been in the sales area. You can probably find a house for your two sons a lot better than we can.' We only know houses that come about because someone says he wants to sell. Usually they sell them on their own. They don't tell us they want to sell a house. They go out and find a customer on their own and then all they have to do is get the transfer of franchise approved." (342a)

embodied. The ambiguity of the supposed agreement is nowhere clarified.[14]

Contrary to the jury instructions which they requested and which were given by Judge Tenney, the plaintiffs now assert tnat Seagram contracted only to put them in touch with suitable distributors who were interested in selling.[15] The record shows that Seagram gave such notice to plaintiffs, and no proof was offered to demonstrate that Seagram was aware of any distributorships for sale as to which it failed to give notice to plaintiffs. (See pp. 28-29 of Seagram's principal brief) The jury was instructed only that it was to decide whether Seagram was obligated to "provide" plaintiffs with an acceptable house. There was no instruction that Seagram could fulfill its obligation merely

14. An egregious example of improper characterization of the evidence is plaintiffs' statement (Br., p. 33) that "Yogman testified that he told Lester Lee that Seagram's president Edgar Bronfman might not want the Lees to have another house but that 'I have gotten around Edgar Bronfman before, and I think I can do it . . . again" (173a). That testimony, of itself, refutes that Seagram's breach was caused by its 'inability' to understand its obligation." The cited testimony was that of Lester Lee, not Yogman, and even Lester Lee did not claim that the statement he attributed to Yogman was made until after the sale of Capitol City.

15. Plaintiffs' switch from the contention throughout the trial that Seagram was obligated to relocate them or provide them with an acceptable distributorship to the post-trial contention that Seagram was merely obligated to notify them of available houses stems from their own conflicting testimony. On cross-examination, Lester Lee, who was not a witness to the agreement, stated that it was his understanding that Seagram was obligated to provide a distributorship and that it had to meet a series of particular criteria, although he admitted that he could not say that he and his brother would have been willing and able to buy any of the distributorships which in fact changed hands. (167a-168a, 177a-178a, 182a-209a, 213a-218a; PX 49, E97) In an apparent effort to rehabilitate Lester's testimony, Eric Lee testified the next day on direct that Seagram was obligated only to put the Lees in touch with prospective sellers but that the "promised distributorship" was to be roughly half the price, profits and profit potential of Capitol City. (234a) Plaintiffs' inability to agree among themselves on the nature of Seagram's alleged obligation should be dispositive of the issue as to the vagueness and unenforceability of the alleged oral agreement.

by notifying plaintiffs of available houses or that Seagram should be found not liable unless there was evidence that Seagram knew of available distributorships but failed to identify them for plaintiffs.[16]

3. Reply to Plaintiffs' Contentions as to Proof of Damages

Plaintiffs have all but conceded (Br., p. 34) that Seagram's obligation could have been no more than ". . . merely to notify plaintiffs as they learned of distributors who were considering the sale of their businesses."[17] Apart

16. Plaintiffs claim (Br., pp. 38-39) that "the instructions clearly described Seagram's obligation as one to use its influence and industry knowledge in order to find an available house, to provide (i.e., afford) to the three Lees by proper notice the opportunity to acquire this house, and thus to assist in directing them to a new place." Seagram respectfully urges the Court to compare this post-trial statement of Seagram's obligation with the jury instructions Judge Tenney gave at plaintiffs' request, noting particularly the directives to the jury to decide whether plaintiffs had established an agreement by which Seagram was bound "within a reasonable time [to] provide the plaintiffs a Seagram distributorship . . . acceptable to plaintiffs," by which Seagram "in return would be required to provide [plaintiffs] with an acceptable distributorship," by which Seagram "promised that it would provide an acceptable distributorship to plaintiffs within a reasonable time," and by which Seagram promised "that it would find a second acceptable distributorship for plaintiffs within a reasonable time." (451a-455a) That an absolute requirement to provide plaintiffs with a new house (not merely to notify them of available houses) was the obligation as to which the jury was to decide is emphasized by the instruction that, "If you find that [Seagram] could not have compelled its distributors to sell their distributorships, you may consider that finding, together with all the other evidence relating to that issue, in determining whether the alleged oral agreement was made." (453a-454a)

17. Plaintiffs elsewhere describe (Br., p. 31) Seagram's obligation as exactly the same duty found by the trial court (102a): "[Seagram's] obligation was in good faith to provide an opportunity for the three Lees to select—from a finite range of available houses—a house which would be sufficiently acceptable so that they could commence negotiations with a third party." Plaintiffs conceded at trial that Seagram was not obliged to assist them in making the purchase

(footnote continued on next page)

from the total absence of proof that Seagram breached such an obligation and apart from the fact that such an alleged agreement was not submitted to the jury (451a-452a), no competent proof was adduced at trial which would sustain the damage verdict on the basis of such an obligation. In fact, plaintiffs' expert testified that his calculations would *not* be applicable to the breach of such an agreement (320a), and no other evidence of damage was offered. Accordingly, the verdict must be set aside for a total failure of proof.

Plaintiffs do not address this issue in their brief except to assert, without citation to relevant authority,[18] that the damage evidence admitted was competent. This is wholly refuted by the testimony of their own expert. Moreover, an examination of the cases upon which plaintiffs rely reveals that, to the extent that these cases deal with the issue of damages, they discuss standards for measuring losses incurred as a result of damage to or destruction of a business or venture and not the loss of an expectation of an investment opportunity.[19] This distinction is crucial, because in

---

(234a) and that it was not obliged to employ coercion or any other unlawful means to insure the "availability" of a house for sale (DX E, E114). Accordingly, since the record fails to show that Seagram owns or controls any distributorships, it could do no more than notify plaintiffs of those houses as to which it had information that they might be available.

18. *Simblest* v. *Maynard*, 427 F.2d 1 (2d Cir. 1970), is cited in connection with this assertion (Br., p. 40), but the case does not deal with damages.

19. *William Goldman Theaters* v. *Loew's, Inc.*, 69 F.Supp. 103 (E.D. Pa. 1946), *aff'd*, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948) (claim for *damages to business* from conspiracy to monopolize); *Flexitized, Inc.* v. *National Flexitized Corp.*, 335 F.2d 774 (2d Cir. 1964), *cert. denied*, 380 U.S. 913 (1965) (claim for *damage to business* from breach of covenant not to compete); *Borden* v. *Chesterfield Farms*, 27 A.D. 2d 165, 277 N.Y.S.2d 494 (1st Dept. 1967) (claim for *destruction of business* venture [afternoon milk routes] from unlawful contract termination, with holding that development costs or market value of routes recoverable, not profits); *Dart* v. *Laimbeer*, 107 N.Y. 664, 14 N.E. 291 (1887) (claim for *destruction*

(footnote continued on next page)

each instance where recovery of profit was allowed the plaintiff had a proprietary or a contractual interest in the business or venture which was damaged or destroyed.

In *Perma Research & Development Co.* v. *Singer Co.*, 402 F.Supp. 881 (S.D.N.Y. 1975), *aff'd*, —— F.2d —— (2d Cir., July 1, 1976) (Nos. 715, 1126), *For Children, Inc.* v. *Graphics International, Inc.*, 352 F.Supp. 1289 (S.D.N.Y. 1972) and *Wakeman* v. *Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205, 4 N.E. 264 (1886), plaintiffs' principal authorities, the lost profits held to be recoverable stemmed directly from the particular, identified enterprise which was the subject matter of the agreement. In each instance, the enterprise destroyed or damaged as a result of defendant's breach was one in which the plaintiff had an existing contractual right and an expectation of profit which could be estimated on a reasonable basis for that particular business. In the antitrust cases cited by the Lees, the plaintiff owned the business or venture which was damaged or destroyed and had the right to expect to earn a profit free from unlawful restraint.

In the case at bar, however, plaintiffs claim no right in a specific identifiable business or enterprise. To the contrary, they claim only the right to have been notified of investment opportunities which might have existed or have been avail-

---

of business based on breach of partnership agreement); *342 Holding Corp.* v. *Carlyle Construction Corp.*, 31 A.D. 2d 605, 295 N.Y.S. 2d 248 (1st Dept. 1968) (claim for lost profits based on *damage to property* where business was operating and trial court reversed where only proof of damages offered was testimony of plaintiffs' accountant ". . . upon the basis of a patently improper formula"); *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927) (claim for *damage to business* from unlawful monopoly); *Madison Pictures* v. *Pictorial Films*, 6 Misc.2d 302, 151 N.Y.S.2d 85 (Sup. Ct. N.Y.Co. 1956) (claim for *damage to business* from breach of joint venture agreement). *Spitz* v. *Lesser*, 302 N.Y. 490, 99 N.E. 2d 540 (1951), is cited for the proposition that Seagram had the burden of producing financial data with respect to the nine distributorships in locations acceptable to the Lees. There is nothing in the record to suggest that Seagram had any more information than it produced at trial.

able and which they might have taken advantage of if the terms of sale had been acceptable. No claim for "lost" profits can be sustained where Seagram had no obligation to deliver a particular distributorship (211a) or even one meeting definite standards of sales volume, growth trend, profitability, profit trend, diversity of brands, or other criteria. (200a-203a)

The requirements for the recoverability of profits in an action on a contract are set forth in one of plaintiffs' principal authorities, *Perma Research, supra,* 402 F.Supp. at 898: (1) the loss of profits must have been a direct result of the breach; (2) the profits must have been contemplated by the parties; and (3) there must be a rational basis for the calculation of damages. Plaintiffs' claim meets none of these tests.

Plaintiffs argue (Br., p. 34) that Seagram was obliged to notify them of distributors who were considering the sale of their businesses. Apart from the failure to prove the breach of such an obligation, it is clear that no conduct on the part of Seagram could directly cause a "loss" of profits to plaintiffs. Plaintiffs claim no contract right in a particular business or enterprise and their ability to purchase any business depended on its availability (197a) and the willingness of the owner to sell on terms acceptable to them. As plaintiffs themselves note (Br., p. 31), "It was never claimed that Seagram was required to act as a clairvoyant who must predict the success or failure of such third-party negotiations". Plaintiffs' expectation of profits, therefore, depended not on a contractual obligation on the part of Seagram, but on the existence of an opportunity acceptable to plaintiffs and their ability to conclude a purchase on terms mutually agreeable to the seller as well as themselves.

The lack of a contractual interest in profits is illustrated by Lester Lee's testimony at trial as to his understanding of the alleged oral agreement. The expectation of profit could clearly not have been within the "contemplation of

the parties", if, as he testified, the plaintiffs would have been willing to look at a house which did not show any profit at all (202a), and no requirements of any kind were communicated to Seagram. (200a-203a) Whether or not a business opportunity existed involving the prospect of profits was a matter beyond defendant's control.

Finally, plaintiffs presented no rational basis for the calculation of damages. The hypothetical model employed by plaintiffs was an amalgam of projections from Capitol City's most profitable year of operations. It represented not a genuine and existing opportunity which Seagram might have called to plaintiffs' attention, but rather a fiction created for the purpose of trial. As a measure of damages, it was neither the "before and after" test nor the "yardstick" test approved in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), as proper in measuring damages for injury to or destruction of a business. What it most resembled was the speculative construct condemned in *City of Binghamton* v. *Rosefsky*, 29 A.D.2d 820, 821, 287 N.Y.S.2d 249, 250 (3d Dept. 1968):

> "To arrive at the result by this formula the record shows that the expert capitalized hypothetical income from hypothetical tenants who would be occupying a hypothetical building."

Plaintiffs make no direct response to Seagram's argument that the capital gains taxes are not recoverable. One point should be noted in that regard. In its main brief (pp. 34-35), Seagram argued that plaintiffs' own figures showed that their income from the AAA bonds they now hold is higher than the return from Capitol City in its best year, assuming for the purpose of argument that Capitol City was an appropriate damage model. Plaintiffs answer (Br., p. 47) that this is true only because Seagram makes the "unwarranted" assumption that the Lees would have conducted the new business in corporate form. Seagram made this assumption because plaintiffs' claim for excess

capital gains taxes is predicated on their accountant's assumption that their corporation would have acquired the new business, not the Lees as proprietors or partners (303a-304a).

Conclusion

For the reasons set forth here and in Seagram's principal brief, the judgment below should be reversed, and entry of a judgment for the defendant dismissing the complaint should be ordered.

Dated: New York, New York
November 3, 1976

Respectfully submitted,

WHITE & CASE
Attorneys for Defendant-Appellant,
Joseph E. Seagram & Sons, Inc.
14 Wall Street
New York, New York 10005
(212) 732-1040

Of Counsel:
MACDONALD FLINN
E. MILES PRENTICE, III
ROBERT W. MANNIX

Service of 3 copies of the within Brief is hereby admitted this 4th day of Nov. 1976

Signed _____

Attorney for Plaintiffs-Appellees

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906
(5611)